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No. _____

In The
Supreme Court of the United States

JOSEPH KNICKERBOCKER,
Petitioners,

v.

OVAKO-AJAX, INC., AJAX ASSOCIATED COMPANIES, INC., RETIREMENT INCOME PLAN FOR NON-UNION EMPLOYEES, AND JONATHAN LUCAS, PLAN ADMINISTRATOR,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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December, 1999

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS IMPROPERLY INTERPRETED ERISA § 502(c)(1)(B) AS REQUIRING A SHOWING OF PREJUDICE BEFORE THE DISTRICT COURT CAN CONSIDER AWARDING THE STATUTORY PENALTY?

II. WHETHER THE DISTRICT COURT AND THE SIXTH CIRCUIT COURT OF APPEALS COMMITTED REVERSIBLE ERROR IN FINDING THAT THE PETITIONER MUST SHOW PREJUDICE AS A PREREQUISITE TO BEING AWARDED THE PENALTY AS PROVIDED FOR UNDER ERISA § 502(c)(1)(B)?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, dated July 20, 1999, is set forth in the Appendix, p. 1a. The opinion of the United States District Court for the Eastern District of Michigan, dated March 4, 1998, is set forth in the Appendix, p. 16a. Both decisions are unreported.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Sixth Circuit issued its' decision in this case on July 20, 1999. Panel rehearing and rehearing en banc were timely requested. Rehearing was denied on September 7, 1999 (Appendix p. 49a). This Petition was timely filed within 90 days of the panel rehearing denial, and is thus timely.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001 et. seq.

29 U.S.C. § 1132(c)(1)(B) provides:

> "Any administrator...(B) who fails or refuses to comply with the request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper."

STATEMENT OF THE CASE

Joseph Knickerbocker (hereinafter "Petitioner") was employed by Ovako-Ajax Corporation (hereinafter "Employer") from 1971 until July 5, 1994, when he resigned his employment as part of a worker's compensation settlement agreement.

On October 12, 1994, Petitioner requested Jonathan Lucas, the Plan Administrator of the Ovako-Ajax Hourly Employee Pension Plan and Salary Employee Pension Plan, (hereinafter "Plan Administrator"), to provide him with (1) the name of the Plan Administrator; (2) an estimate of the benefits he would receive if awarded a disability retirement, under both plans; (3) a copy of the retirement plan and plan description; (4) a copy of the retirement plan documents, including Forms 5500, filed for the last four years; and (5) calculations as to the value of any sick pay Petitioner had accrued to June 20, 1991.

The Plan Administrator refused to provide Petitioner with documents otherwise required under ERISA § 1024(b)(4), and denied Petitioner any form of pension benefits.

Petitioner then filed a complaint in the United States District Court for the Eastern District of Michigan against the

Employer and the Plan Administrator, alleging violations of the ERISA § 1132(a)(1)(A) and § 1024(b)(4). Petitioner claimed that he was entitled to a pension benefit and that the Plan Administrator refused to provide him with the documents he requested and was otherwise entitled to under ERISA § 1024(b)(4).

Petitioner and Respondents, the Employer and Plan Administrator, both filed Cross-Motions for Summary Judgment on August 4, 1997. The District Court granted Respondents' Motion in an unpublished decision dated March 4, 1998.

Petitioner then filed a Notice of Appeal on March 16, 1998, to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals, in three separate opinions, affirmed in part and denied in part the District Court's decision.

Petitioner has filed a Petition for Certiorari based upon the issues and argument presented herein.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS IMPROPERLY INTERPRETED ERISA § 502(c)(1)(B) AS REQUIRING A SHOWING OF PREJUDICE BEFORE THE DISTRICT COURT CAN CONSIDER AWARDING THE STATUTORY PENALTY.

On October 24, 1994, Petitioner requested copies of the Plan Summary and Form 5500, pursuant to his rights under the ERISA § 1024(b)(1). The District Court made a factual finding that the Plan Administrator provided copies of the wrong plan document, and as of March 4, 1998, the date that the District Court entered its' Opinion and Order, had not provided Petitioner with a copy of IRS Reporting Forms 5500 for the year 1993. Further, the Court made a factual finding that the Plan Administrator took thirty-two months to provide Petitioner with the IRS Forms 5500 for the plan years 1989 through 1992, which were requested by Petitioner in October of 1994.

The Sixth Circuit Court of Appeals below, in relying upon its' decision in *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir. 1994), held that many courts, in their discretion, have not imposed any penalty under § 1132(c)(1)(B), in the absence of prejudice. The Sixth Circuit's finding, that absent prejudice the penalty as provided for under § 1132(c)(1)(B) cannot be awarded, is in conflict with the decision of the Fourth Circuit Court of Appeals in *Davis v. Featherstone*, 97

F.3d 734 (4th Cir. 1996); the Seventh Circuit Court of Appeals' decision in *Kleinhans v. Lisle Savings Profit Sharing Trust, et. al.*, 810 F.2d 618 (7th Cir. 1997); the Tenth Circuit Court of Appeals' decisions in *Moothart v. Gary Bell, Bradley P. Pollack, and Bell and Pollack, P.C.*, 21 F.3d 1499 (10th Cir. 1994) and *Boone v. Levenworth Anesthesia Inc.*, 20 F.3d 1108 (10th Cir. 1994); and the Eleventh Circuit Court of Appeals' decisions in *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842 (11th Cir. 1990) and *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488 (11th Cir. 1993).

The Eleventh Circuit Court of Appeals, in *Kleinhans, supra*, has set forth the burden which a plan participant must meet in order to state a claim under ERISA 502(c), 29 U.S.C. § 1132(c). The elements which must initially be established by the participant before a court will consider imposing the statutory penalty are (1) the administrator was required by ERISA to make available to the participant the information the participant requested, and (2) the participant requested and the administrator failed or refused to provide the information requested.

It is well-settled law in the Fourth, Seventh, Tenth and Eleventh Circuit Courts of Appeal that prejudice is a factor which the District Court should consider in making a determination to award the statutory $100 per day penalty under ERISA 502(c). See *Davis, supra* at 738, *Kleinhans,*

supra at 622, *Moothart, supra* at 1506, *Boone, supra* at 1110, *Daughtrey, supra* at 1494, and *Curry, supra* at 846.

Conversely, the Sixth Circuit Court of Appeals' holding, that in the absence of prejudice the trial court should not exercise its' discretion in awarding the $100 per day penalty, is supported by decisions of the First and Fifth Circuit Courts of Appeal in *Rodriguez- Abreu v. Chase Manhattan Bank N/A*, 986 F.2d 580, 588-89 (1st Cir. 1993) and *Godwin v. Sun Life Insurance Co. of Canada*, 980 F.2d 323, 328-29 (5th Cir. 1992).

The Eleventh Circuit in *Daughtrey, supra*, has even gone so far as to state that when there are undisputed facts that a plan administrator refused to provide documents which are otherwise required under section 1132(c), the District Court should be required to impose the penalty as provided under ERISA § 1132(c). The *Daughtrey* Court, at 1494, stated as follows:

> "In *Curry v. Contract Fabricators, Inc. Profit Sharing Plan*, 891 F.2d 842, 347 (11th Cir. 1990), however, we clarified Paris, indicating that 'prejudice is not a prerequisite to an award of civil penalties' under section 1132(c). Since a plan participant would rarely be able to demonstrate that the failure to

provide a timely statement of benefits in itself prejudiced the participant, the intent of Congress in enacting section 1132(c) would be frustrated by such a requirement. Additionally, the penalty range of up to $100 per day is unrelated to any injury suffered by the plan participant, suggesting that section 1132(c) is intended to punish noncompliance with the employer or administrator's disclosure obligations and not to compensate the participant. n11 The district court erred by basing its decision solely on Daughtrey's failure to show prejudice.

Moreover, the undisputed facts of this case require the district court to impose a penalty under section 1132(c). Honeywell provided Daughtrey's statement of benefits approximately one year after her written request, an interval twelve times longer than the statutory period. Honeywell offered no explanation for this delay except to assure the district court that the delay was not intentional."

In *Firestone Tire and Rubber Co., et al v. Bruch, et al*, 489 U.S. 101; 109 S. Ct. 948 (1989); 103 L. Ed. 2d 80, this

Honorable Supreme Court specifically found that it was the Congressional intent in enacting ERISA § 1132(c)(1)(B) to provide for a penalty provision of the ERISA. This Court in *Bruch*, at 118, reasoned as follows:

> "Faced with the possibility of $100 a day in penalties under § 1132(c)(1)(B), a rational plan administrator or fiduciary would likely opt to provide a claimant with the information requested if there is any doubt as to whether the claimant is a 'participant', especially when the reasonable costs of producing the information can be recovered..."

In this case, the Plan Administrator's argument that Petitioner was not prejudiced in its refusal to provide the proper plan documents and the Form 5500s is absurd. Once Petitioner received the Form 5500's in July of 1997, thirty-two months after the Plan Administrator was required to produce the forms, Petitioner found attached to the Form 5500's amendments to the plan documents. Had Petitioner been provided with the amendments to the plan documents in November of 1994, as required under ERISA § 1024(b)(4), he would have immediately recognized that the Employer and Plan Administrator provided the wrong plan documents in January of 1995 and Petitioner would not have had to spend thousands of dollars in discovery in the underlying claim.

II. THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT IT IS THE BURDEN OF THE PETITIONER / PLAN PARTICIPANT TO SHOW PREJUDICE AS A PREREQUISITE TO BEING AWARDED THE STATUTORY PENALTY UNDER ERISA § 1132(c).

In its' unpublished decision below, the Sixth Circuit Court of Appeals implied that the burden of persuasion as to whether or not prejudice is a prerequisite to the District Court's award of a penalty under ERISA § 1132(c)(1)(B), fell on the shoulders of the plan participant, in this case, Petitioner. The Sixth Circuit stated as follows:

> "Without opining on the unbriefed issue of whether Knickerbocker or Lucas had the burden of persuasion on Knickerbocker's claim for penalties, we find that the district court's conclusion that Knickerbocker was not prejudiced is not an abuse of discretion. Further, in light of common precedent, we do not consider the district court's reliance on the lack of prejudice to Knickerbocker to be improper." (Appendix pp. 11a-12a)

In addition to Petitioner's argument above, that the Sixth Circuit improperly interpreted ERISA § 502(c)(1)(B) as requiring a showing of prejudice as a prerequisite to the District Court's award of the statutory penalty, Petitioner additionally argues that the Sixth Circuit's finding that the burden is upon the Petitioner (plan participant) to show prejudice is also in conflict with decisions of the Courts of Appeals for the Fourth, Seventh, Tenth and Eleventh Circuits; e.g., *Davis, supra, Kleinhans, supra, Boone, supra, Moothart, supra, Curry, supra and Daughtrey, supra.*

In enacting the ERISA, Congress made it abundantly clear that the plan administrator was required to provide all relevant information within thirty days of the receipt of a written request for said information. 29 U.S.C. § 1024(b)(4) is one of the key ERISA disclosure provisions, and it provides as follows:

> "The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract or other instrument under which the plan is established or operated. The administrator may make a reasonable charge

> to cover the cost of furnishing such complete copies. The secretary may, by regulation, prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence."

Petitioner contends that, quite clearly, the decision of the Sixth Circuit Court of Appeals below, in requiring that the burden of persuasion be on the plan participant, is in direct contravention of the intent of the ERISA disclosure provisions. It must be assumed that Congress intended to place the burden upon the plan administrator, showing that the participant was not prejudiced when the plan administrator refused or otherwise failed to provide documents which are mandated under ERISA § 1024(b)(4). Moreover, since 1989, plan administrators have been placed on notice that they are subject to the statutory penalty provision of ERISA § 1132(c) when this Court stated in *Bruch, supra*:

> "Faced with the possibility of a $100 a day in penalties under § 1132(c)(1)(B), a rational plan administrator or fiduciary would likely opt to provide a claimant with the information requested..."*Firestone Tire and Rubber v. Bruch*, at 118.

The Sixth Circuit Court of Appeals erred in finding that the burden is upon the Petitioner to show prejudice.

CONCLUSION

This Honorable Court should grant *certiorari* to review this important matter and reverse the Sixth Circuit Court of Appeals and order that Petitioner was properly entitled to the penalty as prescribed in ERISA § 1132(c).

Respectfully Submitted,

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Dated: December 1, 1999

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No. 98-1319

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

6th Circuit Court of Appeals
Filed 7/20/98
Leonard Green, Clerk

JOE KNICKERBOCKER,

Plaintiff-Appellant,

V.

OVAKO-AJAX, INC., AJAX ASSOCIATED COMPANIES INC. RETIREMENT INCOME PLAN FOR NON-UNION EMPLOYEES, and JONATHAN LUCAS, PLAN ADMINISTRATOR,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

Before: WELLFORD, SUHRHEINRICH, and MOORE, Circuit Judges.

PER CURIAM. In the district court, Joe Knickerbocker challenged his employer's refusal to award him "dual" pension benefits, which were promised to him but

which are not provided by the terms of the benefits plans in which he participated. The parties having resolved the pension issues during the pendency of this appeal, we focus on Knickerbocker's additional claim for medical benefits and his request for statutory penalties based on the plan administrator's failure to disclose information that Knickerbocker requested. The court **AFFIRMS** the district court's grant of summary judgment to the defendants. We **REMAND** this case to the district court for consideration of Knickerbocker's request for an award of attorney fees.

I. BACKGROUND

Knickerbocker's attorney informed us at oral argument that he is no longer pressing any claims pertaining to Knickerbocker's pension benefits, leaving only the claims related to medical benefits. However, Knickerbocker has requested attorney fees, and the resolution of the pension issues is relevant to whether he is the prevailing party. We therefore provide a relatively detailed summary of the original issues in the case.

Knickerbocker began working at the Ajax Rolled Ring Company in 1971 as an hourly employee under a union contract. In 1981, he was asked to move from an hourly position to a salaried one, without any increase in salary. Knickerbocker discussed the terms of this offer with Jim Valrance, president and majority stockholder of Ajax. He was

concerned about his pension benefits and about what would happen if he ever became unable to work due to a disability. Valrance ameliorated Knickerbocker's concerns by offering him "dual" pension benefits. At the time, Ajax had a benefits plan for hourly employees and was in the process of establishing one for salaried employees. Valrance stated that Knickerbocker's pension under the Salaried Plan would be calculated using his *entire* length of service with the company but that Knickerbocker would nonetheless receive an additional pension under the Hourly Plan. Valrance also told Knickerbocker that his health benefits would continue for life if he took disability retirement. In 1989, when Ajax was sold and became Ovako-Ajax, Knickerbocker confirmed Valrance's promises with the new management.

Valrance's promises were not consistent with the terms of the Salaried Plan, which went into effect shortly after Knickerbocker accepted his new position. Under the plan, Knickerbocker was entitled to pension benefits based only on his length of service as a salaried employee. Similarly, he was entitled to benefits under the Hourly Plan based on his length of service as an hourly employee. In addition, the Salaried Plan does not provide health benefits to employees who retire before the age of 62, even due to disability.[1] Both plans are

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[1]The health-benefits provision of the Salaried Plan is not in the Joint Appendix filed for this appeal, and Knickerbocker's attorney informed us at oral argument that it is not in the record. However, the parties seem to agree that its terms are as described.

governed by the Employee Retirement Income Security Act ("ERISA").

Knickerbocker stayed with the company until June 6, 1991, when he was forced home by a back injury he had received at work the month before. Ovako filed a worker's compensation claim on his behalf and shortly thereafter laid him off.

When Knickerbocker tried to apply for pension benefits, the plan administrator, Jonathan Lucas, sent him a statement indicating that he was not entitled to a disability pension because he was not an active employee but had been laid off. Lucas failed to respond to Knickerbocker's request for copies of the Salaried Plan and related documents until Knickerbocker's attorney renewed the request for a copy of the plan. In May 1995, an attorney for the plan advised Knickerbocker's attorney that the denial of benefits could be appealed to the company's Retirement Committee. In December 1995, after the Committee had failed to act on the appeal for several months, Knickerbocker filed this lawsuit.

In January 1997, the district court stayed the suit to await the Retirement Committee's decision, which was issued in March of that year. The Committee awarded Knickerbocker pension benefits that are greater than required under the terms of the plans but less than Valrance promised.[2]

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[2]The Committee departed from the terms of the plans because Ovako was already planning to switch to a more generous method for coordinating hourly and salaried pension benefits and because

However, Knickerbocker cannot receive any payments from the Salaried Plan until he has exhausted his eligibility for long-term disability ("LTD") benefits through Ovako's disability insurance program. Thus, for the time being, Knickerbocker can receive only his hourly pension.

Knickerbocker's pensions are also subject to offsets for worker's compensation benefits, which Knickerbocker received until accepting a final settlement in July 1994, about a year before he applied for his pensions. After the Committee's 1997 decision, Ovako continued to refuse to pay Knickerbocker's hourly pension, apparently on the basis of the worker's compensation-offset rule. In a letter dated December 30, 1998 -- twenty-one months after the Committee's award and ten weeks before the oral argument in this case -- Ovako acknowledged that none of Knickerbocker's worker's compensation benefits were properly offset against his hourly pension. The letter indicated that Ovako would pay that pension retroactive to June 1995.

In July 1997, after the close of discovery in this case, Ovako's attorney wrote to Knickerbocker's. He stated that the plan documents Ovako had sent to Knickerbocker in response to his 1994 and 1995 requests were outdated (and were so at the time they were sent). The attorney enclosed updated copies. Also in 1997, Ovako's attorney at last sent Knickerbocker copies of the plan's IRS Forms 5500 (Annual

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Knickerbocker had been sent at least one benefits statement based on the new method.

Return/Report of an Employee Benefit Plan) for 1989 through 1992. This disclosure appears to have satisfied Knickerbocker's 1994 request for "documents filed within the last four years." [3] However, Knickerbocker had also requested the 1993 form, and after receiving the 1989 through 1992 forms, he requested the forms for 1994, 1995, and 1996. Although Ovako apparently disclosed the latter three forms, as of the date of the district court's final judgment in this case Ovako had not disclosed the 1993 form. J.A. at 35 (Dist. Ct. Op.).

In this lawsuit, Knickerbocker sought: (1) recovery of his hourly pension benefit, pursuant to 29 U.S.C. § 1132(a)(1)(B) and state contract law; (2) the right to receive full "dual" pension benefits, as promised by Valrance, pursuant to § 1132(a)(1)(B), equitable estoppel under ERISA, and state contract law; (3) penalties for Lucas's failure to disclose plan documents, pursuant to 29 U.S.C. §§ 1024(b)(4) and 1132(c)(1)(B). In addition, the parties and the district court have addressed Knickerbocker's claim that he is entitled -- pursuant to equitable estoppel under ERISA, breach of a collective bargaining agreement, and state contract law, -- to

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[3]The plan's fiscal year runs from May 1 to April 30, and it files its Form 5500 six to ten months after the close of the fiscal year. Thus, the 1993 formwould not have been prepared until late 1994 or early 1995, a few months after Knickerbocker's 1994 request for plan documents.

receive health benefits as a retiree, even though health benefits are not mentioned in the complaint. The district court held that the Retirement Committee was within its discretion in refusing to award dual benefits, that equitable estoppel is not available under ERISA when the terms of the plan are unambiguous, and that Knickerbocker's state-law claims are preempted. The district court also declined to exercise its discretion to impose penalties for Lucas's failure to disclose plan documents because the delay was not intentional and did not prejudice Knickerbocker.

Through its December 1998 letter, Ovako has conceded Knickerbocker's first claim. Knickerbocker's attorney indicated at oral argument that he was no longer pursuing the second.[4] Therefore, the issues before us are Knickerbocker's claims for health benefits, statutory penalties,

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[4]Knickerbocker's attorney informed us that there were no longer any pension issues in the case. We take this to mean that Knickerbocker is no longer seeking a pension calculated as Valrance promised but is content with the Committee's calculations. In any event, the district court was surely correct that the Committee's decision was not an abuse of discretion, which is the proper standard of review. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989) (holding that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard *unless* the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan") (emphasis added); *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 552 (6th Cir. 1998) (en banc) (holding that the language of an ERISA plan vested the administrator with discretion to make fact-based benefits determinations).

and attorney fees.

II. ANALYSIS

A. HEALTH BENEFITS

We apply the same summary judgment standard as the district court and review its decision de novo. See *Davis v. Sodexho, Cumberland College Cafeteria*, 157 F.3d 460, 462 (6th Cir. 1998). Summary judgment is appropriate only when there are no genuine issues of material fact, so that one party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. 56(c).

Knickerbocker argues that the plan is estopped from denying that he is entitled to health benefits. We have held that estoppel against an ERISA plan can never "be applied to vary the terms of unambiguous plan documents." *Sprague v. General Motors Corp.*, 133 F.3d 388, 404 (6th Cir.) (en banc), *cert. denied*, ---U.S.---, 118 S. Ct. 2312 (1998). Estoppel is available only when the terms of the plan are ambiguous and the participant relies on a misleading interpretation of the ambiguity. *See id.* As we have mentioned, the health-benefits provision of the Salaried Plan is not before us, which makes it difficult for us to determine whether the plan is ambiguous. We note, however, that the parties seem to agree that the terms of the plan are clear. In addition, we believe the burden is on Knickerbocker to point

out any claimed ambiguity in the language of the plan which would justify reliance on Valrance's promise. Because the language of the plan is not before the court, he cannot do so. He therefore cannot prevail under *Sprague*.

Knickerbocker also argues that he is entitled to health benefits from Ovako because after he took a management job, the union to which he formerly belonged negotiated health benefits for union members who take disability retirement. This argument is meritless. Knickerbocker simply is not a party to this contract. He tries to suggest a connection by noting that the union contract incorporates the Hourly Plan, under which he was awarded a pension. Knickerbocker's past participation in the Hourly Plan does not make selected other terms of the union contract applicable to him.

Finally, Knickerbocker's brief appears to argue that there was an "express or implied contract to award him [health] benefits under both the Hourly and Salaried [Plans]." Knickerbocker Br. at 29.[5] State law claims to recover benefits from an ERISA plan are preempted. Knickerbocker's reliance on *Perry v. P*I* E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), is misplaced, as that case does not apply to contract and estoppel claims that are "in essence . . . for the recovery of an ERISA plan benefit." *Fisher v. Combustion Engineering, Inc.*, 976 F.2d 293, 297 (6th Cir. 1992) (internal quotation marks omitted). Because Knickerbocker seeks to

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[5]The quoted passage actually refers to pension benefits, but the brief incorporates these arguments in its discussion of medical benefits.

enforce an agreement contrary to the written terms of the plan, and obtain benefits which the plan simply does not provide, his state-law contract claims are preempted.

B. STATUTORY PENALTIES

Knickerbocker contends that the district court erred by not imposing upon Ovacko's plan administrator, Jonathan Lucas, any statutorily permitted penalty for Lucas's failure to provide him with the plan documents that he requested. ERISA § 502(c)(1)(B) provides in relevant part:

> Any administrator. . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1)(B). Although the statute authorizes penalties, it does not require them. In fact, the statute

expressly commits the decision to impose penalties to the court's discretion. Therefore, we only review the district court's decision whether to impose penalties for an abuse of discretion. *See Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1068 (6th Cir. 1994). The abuse of discretion standard is a highly deferential standard. As this Circuit has stated: "An abuse of discretion standard is a highly deferential standard. As this Circuit has stated: "An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made." *Id.* (citing *In re Bendectin Litigation*, 857 F.2d 290, 307 (6th Cir.1988), *cert. denied*, 488 U.S. 1006 (1989); *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 157 (6th Cir.1988)). Although § 1132(c)(1)(B) does not require prejudice to impose penalties, a district court may consider prejudice in exercising its discretion. We note that many courts, in their discretion, have not imposed any penalty under § 1132(c)(1)(B), in the absence of prejudice. *See Bartling*, 29 F.3d at 1068 (citing *Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 588-89 (1st Cir.1993); *Godwin v. Sun Life Assurance Co. of Canada*, 980 F.2d 323, 328-29 (5th Cir.1992)).

In this case, Knickerbocker requested the district court to impose penalties but failed to persuade the district court to exercise its discretion to do so. Without opining on the unbriefed issue of whether Knickerbocker or Lucas had the burden of persuasion on Knickerbocker's claim for penalties, we find that the district court's conclusion that Knickerbocker

was not prejudiced is not an abuse of discretion. Further, in light of common precedent, we do not consider the district court's reliance on the lack of prejudice to Knickerbocker to be improper. Moreover, we do not think that "leniency" in not imposing penalties undermines the intent of Congress, where Congress does not require penalties but merely permits them and even expressly commits the decision to impose sanctions to the discretion of the district court. Finally, we note that this Circuit has held in reviewing the propriety of penalties under § 1132(c)(1)(B) that a district court "would have been acting within its discretion if it had imposed no penalty at all." *Bartling*, 29 F.3d at 1069. Accordingly, we are not "firmly convinced" that the district court made a mistake in not imposing penalties on Lucas.

C. ATTORNEY FEES

Knickerbocker requests attorney fees pursuant to 29 U.S.C. § 1132(g)(1). Because Knickerbocker has abandoned his claim for "dual" pensions once his long-term disability benefits expire, he is not the prevailing party on that issue, nor has he prevailed on the issue of the statutory penalty. However, Knickerbocker's lawsuit and appeal may have been a catalyst to Ovako at last admitting that Knickerbocker was entitled to his hourly pension. *Cf. Perket v. Secretary of Health & Human Servs.*, 905 F.2d 129 (6th Cir. 1990)

(holding that a plaintiff can be "prevailing party" under the Equal Access to Justice Act without obtaining a final adjudication on the merits, if the lawsuit is a catalyst that prompts the defendants to take the desired action). Knickerbocker may move the district court on remand to consider making an appropriate fee award. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682, (1983) (holding that a plaintiff must achieve "some success on the merits" to be eligible for fees under the Clean Air Act); *Cattin v. General Motors Corp.*, 955 F.2d 416, 427 (6th Cir. 1992) (noting with approval the Seventh Circuit's application of *Ruckelshaus* in an ERISA case); *see also Schwartz v. Gregori*, 160 F.3d 1116 (6th Cir. 1998) (discussing appellate attorney fees in ERISA cases), *cert. denied*, 119 S. Ct. 1756 (1999); *O'Bryan v. County of Saginaw, Michigan*, 722 F.2d 313, 314-15 (6th Cir. 1983) (holding that requests for appellate attorney fees should be considered in the first instance by the district court).

III. CONCLUSION

We **AFFIRM** the district court's holdings that Knickerbocker is not a beneficiary of the union contract and that he cannot bring an estoppel claim or a state-law contract claim against the Salaried Plan. We **AFFIRM** the district court's refusal to impose penalties for Ovako's failure to disclose plan-related documents. However, we **REMAND** this case for consideration of Knickerbocker's request for

attorney fees.

MOORE, Circuit Judge, concurring in part and dissenting in part. Under ERISA, any plan administrator

> who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested . . . within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1)(B). We review for abuse of discretion the district court's refusal to impose penalties under this section. See *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1068 (6th Cir. 1994).

In deciding whether to impose penalties, a district court may consider whether the failure to provide requested information was intentional, reflected bad faith on the part of the administrator, or prejudiced the participant in any way. See *Bartling*, 29 F.3d at 1068-69; *Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 588 (1st Cir. 1993).

Often, a court will account for the lack of prejudice or bad faith by imposing a reduced daily penalty, *see, e.g., Moothart v. Bell*, 21 F.3d 1499, 1506 (10th Cir. 1994) (stating that thirty-dollar per day penalty reflected "the lack of injury and the limited prejudice involved"), but the court is generally free to impose no penalty at all. *See Bartling*, 29 F.3d at 1068-69; *but see Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494-95 (11th Cir. 1993) (holding that penalties were mandatory, despite lack of prejudice, in light of unexplained twelve-month
delay). The courts should not, however, be so lenient as to undermine Congress's intent. I do not understand why plan administrators are reluctant to share information with participants, compelling Congress to enact § 1132(c)(1)(B). But, apparently, reluctant they are, and Congress's attempt to promote disclosure will be defeated if the courts enforce the statutory requirements only when the employee can demonstrate substantial prejudice.

The statutory language provides for penalties when an administrator "*fails* or *refuses*" to provide required information. 29 U.S.C. § 1132(c)(1)(B) (emphasis added). Thus, the district court should not have been so quick to deny penalties because Knickerbocker "has not shown that his rights were harmed or otherwise prejudiced by the delay in his receipt of the requested information, nor has he demonstrated bad faith or intentional delay on Lucas's part." J.A. at 36-37 (Dist. Ct. Op.). In addition, I believe the district court

erred by imposing the burden of persuasion on Knickerbocker. The Eleventh Circuit has held that the burden is on the administrator to demonstrate the lack of prejudice or bad faith. *See Daughtrey*, 3 F.3d at 1494. This holding is consistent with our decision in *Bartling*, which cited affirmative evidence of the administrator's good faith in affirming a relatively light penalty. *See Bartling*, 29 F.3d at 1065-66 (describing negotiations between plaintiffs and administrator over what should be disclosed). Because the failure to disclose requested documents is a violation of ERISA, the burden should be on
the administrator to explain the failure to do so.

When asked to explain this violation at oral argument, Ovako's response defied the statutory purpose in requiring disclosure. Ovako argued that there was no need to disclose the Form 5500 to Knickerbocker because it is "fairly complex" and would have helped Knickerbocker understand his benefits only "if [he] were an actuary." According to Ovako, if Knickerbocker wanted to know his rights under the plan, he should have looked at the benefits statement provided by Lucas. Of course, that statement incorrectly informed Knickerbocker that he was not entitled to any benefits. Ovako's argument ignores the reason Congress required disclosure of these documents. Knickerbocker was not required to rely on Lucas's statement of his benefits. Rather, he was entitled to hire his own actuary or attorney to review the documents and determine whether he was receiving his

due. Ovako's continuing insistence that Knickerbocker had no need or right to see these documents underscores the willfulness of its noncompliance with ERISA, as does the fact that it somehow managed to convince the district court that its violation was not intentional despite failing to disclose some documents right up to the date of the district court's judgment. The company has no explanation for much of the delay other than its disagreement with Congress's conclusion that plan participants have a right to see these documents. While for various reasons the full hundred-dollar-per-day penalty would certainly not be desirable in this case, no penalty at all is equally inappropriate. I would therefore vacate the refusal to impose penalties and direct the district court to reconsider this matter on remand.

HARRY W. WELLFORD, Circuit Judge, **concurring in part** and **dissenting in part**:

In all but section II.C. of the opinion dealing with attorney fees, I concur in the decision on that complex claim by plaintiff, Joe Knickerbocker, against his former employer. I respectfully dissent from the remand on attorney fees. I would hold that the district judge did not abuse his discretion in denying attorney fees.

In his forty-six page appellate brief to this court, plaintiff submitted one paragraph on the attorney fee issue. In the one

attorney fee case cited in that brief, *Foltice v. Guardsman Products, Inc.*, 98 F.3d 933 (6th Cir. 1996), *cert. denied*, 520 U.S. 1145 (1997), we affirmed the denial of attorney fees, stating:

> Lest there be any misunderstanding, however, we take this opportunity to reiterate that neither the American Rule nor the opposing "English Rule" governs attorney fee questions in ERISA cases of this type. When Congress wants to provide that the loser shall pay the winner's attorney fees, it knows how to say so. *See* 29 U.S.C. § 1132(g)(2). Congress has not done that here. Neither has Congress seen fit to create any kind of statutory presumption regarding the payment of attorney fees in cases of this type. Congress havingchosen to leave the matter for the courts to decide, in the exercise of their decision, case-by-case, we think it would ill-behoove us to limit judicial discretion by creating a non-statutory presumption either for or against the award of attorney fees.

Id. at 939. We discussed the factors set out in *Secretary of Labor v. King*, 775 F.2d 666 (6th Cir. 1985), in reaching the decision in *Foltice*.

This court's fleeting reference in *Cattin v. General Motors Corp.*, 955 F.2d 416, 427 (6th Cir. 1992), to *Bittner v. Sadoff and Rudoy Indus.*, 728 F.2d 820, 829 (7th Cir.

1984), certainly does not indicate approval of *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), principles in this type of ERISA claim in contradistinction to the *Foltice* rationale. *Cattin*, moreover, involved a *denial* of claimed attorney fees under ERISA. Furthermore, *Cattin*, 955 F.2d at 427, and *Schwartz v. Gregori*, 160 F.3d 1116, 1118 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1756 (1999),[6] established abuse of discretion as the standard to be applied in actions with respect to attorney fee claims in ERISA cases.

In my view, the district court did not abuse its discretion in denying attorney fees in this case. Plaintiff has set out no authority justifying a remand for further consideration in this issue, and I am not persuaded by the authority cited by the other panel members for a remand on this question.

Accordingly, I dissent as to that part of the decision which directs a remand "for consideration of Knickerbocker's request for attorney fees."

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[6]Schwartz also involved our affirmance of a denial of attorney fees in an ERISA case.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOE KNICKERBOCKER,

Plaintiff,

Case No. 95-CV-60335-AA

vs.

HON. BARBARA K. HACKETT

OVAKO-AJAX, INC., AJAX ASSOCIATED COMPANIES, INC., RETIREMENT INCOME PLAN FOR NON-UNION EMPLOYEES, and JONATHAN LUCAS,

Eastern Dist. of Michigan
Filed 11/4/98

Defendants.
_____/

ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

Plaintiff Joseph Knickerbocker, a former employee of defendant Ovako-Ajax, Inc., filed the above-captioned action attempting to obtain a disability pension pursuant to the terms

of the defendants' benefits plans for salaried and hourly employees, both of which are covered by the Employee Retirement Income Security Act (ERISA). Now before the court are plaintiff and defendants' cross-motions for summary judgment. For the following reasons, plaintiff's motion shall be denied and defendants' motion shall be granted.

I. FACTS

Plaintiff commenced employment with defendant Ovako-Ajax, Inc.'s (Ovako or the Company) predecessor, Ajax Rolled Ring Company,[1] as an hourly employee on September 13, 1971. At that time, plaintiff was represented by Local 508 of the Ornamental Ironworkers and was also a participant in the Company's hourly employees' retirement plan (the Hourly Plan). The Hourly Plan was funded entirely by the Company and was incorporated by reference into the union contract and booklet.

According to plaintiff, in January or February of 1981, James Valrance, then president of Ajax Rolled Ring,[2] requested that plaintiff leave the protection of his union position and become a management employee. Several weeks

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[1]Ovako Steel, Inc. purchased the assets of the Ajax Associated Companies in May of 1990, forming Ovako-Ajax.

[2]Valrance retired from Ajax Rolled Ring in 1985.

of negotiations thus ensued and on May 5, 1981, plaintiff accepted an offer to move from the Company's hourly ranks into management.

During discussions with plaintiff about moving into management, Valrance generated a handwritten document concerning plaintiff's contemplated pension benefits as a salaried employee. The Company did not at the time have a pension plan for its non-union workforce, but it anticipated creating one within the proceeding six months (the Salaried Plan). However, under the terms of plaintiff's Hourly Plan, he received years of credited service for the over-time hours he worked. As of May 5, 1981, plaintiff had less than 10 years of actual employment with defendants, but was credited with 12.2 years for pension purposes. As a result, one of plaintiff's primary concerns while negotiating the terms and conditions of a management position, was that he would be required to work a large amount of over-time which, under the Hourly Plan, would be compensated by the award of additional retirement credits.

Plaintiff alleges that in order to satisfy his concerns, Valrance agreed to enhance plaintiff's salaried pension benefits by giving him full credit for the years of service he had with the union once the Salaried Plan was established. Plaintiff claims that Valrance further agreed that his years of service as an hourly employee would also be credited into his pension under the contemplated Salaried Plan. In other words, plaintiff argues that Valrance promised him that when

he retired he would receive an hourly pension based on his service as an hourly employee and a salaried pension based on his entire service with the Company. In support of his argument, plaintiff points to the handwritten document created by Valrance to show plaintiff what his contemplated retirement pension would be if he retired at age 62 as a management employee.

In addition, plaintiff maintains that Valrance also told him that if he became disabled, he would continue to receive full pay and medical benefits from the Company, assuring plaintiff that if he accepted the management position he would not lose any benefits. However, Valrance's handwritten document makes no mention of a disability retirement. Accordingly, plaintiff accepted a management position on May 5, 1981. The Company then entered into a trust agreement for the Salaried Plan on April 29, 1992, with an effective date of May 1, 1981. The Salaried Plan is funded entirely by the Company; participants are not required or permitted to make contributions.

Next, on March 26, 1991, plaintiff sustained a work place injury which caused him to cease active employment as of June 6, 1991. On that date, the Company filed a workers' compensation claim on plaintiff's behalf, and shortly afterwards, plaintiff was placed on lay-off.[3] Plaintiff received

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[3]Plaintiff received a monthly workers' compensation from June 6, 1991, to May of 1993, when his benefits were

short-term disability benefits for the period between June of 1991, and January of 1992, and then received long-term disability (LTD) benefits until September, 1994. In October of 1994, plaintiff's LTD benefits were discontinued after the benefits carrier asserted that plaintiff had failed to keep it apprised of the status of his workers' compensation claim and continuing disability.

On October 12, 1994, plaintiff sent a letter to Jonathan Lucas, the Human Resource Manager for Ovako and the Chairman of the Retirement Committee[4] for both the Hourly and Salaried Plans, requesting a copy of the Salaried Plan, including IRS Forms 5500, and an estimate of the disability benefits he would receive if awarded a "Disability Retirement."[5] On December 21, 1994, Lucas advised plaintiff that he was not eligible for a disability retirement on the

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discontinued. Plaintiff applied for reinstatement of those benefits and his claim was redeemed for $85,000 on July 5, 1994.

[4]The general administration of both the Salaried and Hourly Plans is vested in a Retirement Committee appointed by the Company's Board of Directors.

[5]Plaintiff claims that before sending the letter, he first spoke to Lucas on the phone and requested the applications for disability pensions under both the Hourly and Salaried Plans. However, plaintiff has no proof of his contention, and he only requested that Salaried Plan documents in his October 12, 1994, letter.

grounds that plaintiff was not an active employee at the time he applied for such benefits. Lucas also transmitted a benefits statement showing plaintiff's accrued normal retirement benefits under the Salaried Plan, but failed to provide plaintiff with the documentation he had demanded.

On January 9, 1995, plaintiff's attorney sent a letter to Lucas stating that he represented plaintiff and asking for a copy of "the Retirement Plan and a copy of the Plan Description" so that he could assemble an administrative appeal of Lucas's December 21, 1994, denial of disability retirement benefits. On January 20, 1995, Lucas again informed plaintiff that he was not entitled to any disability retirement benefits and also sent copies of the Salaried Plan documents.

Thereafter, on March 20, 1995, plaintiff's attorney sent a letter to Lucas seeking immediate payment of disability retirement pension benefits to plaintiff retroactive to the date of plaintiff's original request for benefits. On March 24, 1995, defendants' attorney responded on behalf of the administrator for the Salaried Plan denying plaintiff's claim for disability pension benefits.

On May 22, 1995, plaintiff's attorney wrote to defendants' Retirement Committee advising that plaintiff wished to appeal the denial of his request for disability benefits under the Salaried Plan. The letter also stated that in December of 1994, plaintiff had requested an application for disability benefits under the Hourly Plan, but that no

application under that plan had been provided. Thus, plaintiff stated "please consider this an Application for Benefits or an Appeal of your previous decision to deny benefits under that Plan."

The Retirement Committee then asked plaintiff on June 16, 1995, to submit certain specific information it needed in order to render a determination as to plaintiff's appeal, including a signed authorization for disclosure of social security records form.[6] On July 6, 1995, plaintiff sent defendants a six-page letter responding to their every question, over 130 pages of documents setting forth plaintiff's medical condition, and the signed authorization for release of social security records. However, on August 24, 1995, defendants' attorney claimed they never received the authorization and requested another. On September 6, 1995, plaintiff forwarded another signed authorization to defendants.

Having heard nothing from defendants by October 25, 1995, plaintiff advised defendants that unless he received an affirmative ruling on his appeal by November 1, 1995, he would be required to file a federal lawsuit to enforce his rights under ERISA. When no response came, plaintiff filed this

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[6]As of June 16, 1995, plaintiff was awarded social security disability benefits retroactive to June of 1991, because the Social Security Administration determined that plaintiff was totally and permanently disabled from engaging in employment.

case on December 20, 1995.

On January 29, 1997, the court granted defendants' motion for a stay of proceedings to remand the case to the Retirement Committee to decide plaintiff's appeal under the Salaried Plan and his claim under the Hourly Plan. In February of 1997, the Committee convened and finally issued its determination on March 13, 1997.

The Retirement Committee awarded plaintiff disability pension benefits under the terms of the Salaried Plan beginning on the later of January 1, 1997, or the date on which plaintiff's eligibility for long-term disability insurance benefits expires other than by reason of his own failure to comply with requests from the insurance company or to pursue reinstatement of his LTD benefits.[7] The Committee also awarded plaintiff a disability pension benefit under the terms of the Hourly Plan beginning on June 1, 1995, the first day of the month following the date when the Committee received plaintiff's application for benefits under that plan. Thus, plaintiff was credited for both his years of service as an hourly and as a salaried employee. Ultimately, plaintiff was awarded a total monthly pension benefit in the amount of $981.97 with the total amount paid directly out of the Salaried Plan offset by the $244 in benefits he would receive out of the

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[7]January 1, 1997, was the first day of the month after the date the Committee received satisfactory evidence of plaintiff's permanent and total disability.

Hourly Plan.

The Company explains how the Committee reached its determination: the Salaried Plan applies to employees in a salaried job classification, and only plan participants are eligible for retirement benefits. Section 4.5 of the Salaried Plan provides that a plan participant who had incurred a permanent and total disability is eligible for a disability retirement benefit in an amount equal to the participant's accrued normal retirement benefit beginning on the later of: (1) his permanent and total disability retirement date; or, (2) the date upon which payment of any long-term disability benefits derived from any other company benefit plan or company long-term disability insurance ceases. A participant's permanent and total disability retirement date is the first day of the month following the date the Committee received proof satisfactory to it that the participant has a qualifying disability.

Under § 6.1 of the Salaried Plan, a participant's retirement benefits are calculated with respect to the participant's service which is credited for each year as a participant in the Plan. Section 6.5(B) provides that a person such as plaintiff who transfers from hourly to salaried status with the company does not accrue a benefit under the Salaried Plan with respect to his service as an hourly employee. In other words, such an employee's retirement benefit under the Salaried Plan is determined solely by referring to his credited service as a salaried employee. Assuming he met all the

requirements, the employee would be separately vested under the Hourly Plan for his term of service as an hourly employee.

The Hourly Plan covers persons employed by the Company on an hourly basis. Under the Hourly Plan, if a participant can demonstrate that he has a permanent and total disability as defined by the Plan, he is eligible for a disability benefit beginning on his disability date. Under the Hourly Plan, the disability date is the first day of the month following the latest of: (1) the date on which the Committee receives the person's application for a disability under the Hourly Plan; (2) the first day of the month following the expiration of any Company-provided temporary disability benefits; or, (3) the person's retirement date.

Despite the clear language of the Plans, the Committee sent plaintiff a benefit statement on December 21, 1994, indicating that his accrued normal retirement benefit under the Salaried Plan would be determined on the basis of his entire service with the Company (both as an hourly and salaried employee), but that part of plaintiff's increased benefit from the Salaried Plan would be paid from his accrued benefit under the Hourly Plan. Under the terms of both Plans, plaintiff's monthly retirement benefit would normally consist of his Hourly Plan benefit calculated with respect to his years of service as an hourly employee plus his Salaried Plan benefit calculated solely with respect to his years of service as a salaried employee. However, the method used by the Committee in the benefit statement to calculate plaintiff's

disability benefit resulted in a greater overall benefit than he would have received under the terms of the Plans. Because plaintiff was eligible for and was awarded a benefit paid out under the Hourly Plan of $244 per month, that amount is subtracted from the total amount paid from the Salaried Plan. The result is that plaintiff is to receive $981.97 per month as his disability benefit, $244 of which is taken from the Hourly Plan, and the remainder from the Salaried Plan.

However, the Retirement Committee also determined that plaintiff's eligibility for LTD insurance payments might not have expired at the time it awarded him a disability pension under the Salaried Plan. Because it appeared that plaintiff might not have exhausted his eligibility for LTD benefits as required under the Salaried Plan, the Committee found that he could not begin to receive a disability benefit under the Plan until he demonstrated that he was acting diligently and in good faith in fully exhausting his eligibility.

Accordingly, plaintiff quickly contacted the LTD carrier, and after an exchange of letters, it was determined that plaintiff's LTD benefits would be reinstated upon the LTD carrier receiving a credit for the social security and workers' compensation benefits paid to plaintiff. As it now stands, as of July 1, 1998, plaintiff will receive a long-term disability benefit in the amount of approximately $1,300 per month, as well as $1,200 monthly in social security disability payments.

Plaintiff's current position is that the Retirement Committee erroneously refused to award him dual disability

pension benefits under both the Salaried and Hourly Plans, meaning an hourly pension based on his service as an hourly employee and a salaried pension based on his entire service with the Company, in addition to medical benefits under the Hourly Plan. On the other hand, the Company explains that both Plans include a process for determining claims for retirement benefits and for reviewing and deciding appeals of denied claims:

> The Salaried Plan provides that the decision of a majority of the Retirement Committee and any action taken by is concerning any question arising out of or in connection with the Plan shall be final, conclusive, and binding on all persons having an interest in the Plan. Section 9.2 of the Salaried Plan also authorizes the Committee to make findings of facts and determinations as to the rights of any person applying for benefits under the Plan and to interpret the Plan and decide finally and conclusively any questions that may arise in connection with the Plan.
>
> The Hourly Plan contains the identical provisions as the Salaried Plan and further vests the Retirement Committee with the broadest discretion permitted under law in exercising its authority under the Plan. Like the Salaried Plan, it recognizes that the Committee has the power to make final and binding determinations on all persons subject to the Plan, and affords it with full and final

> authority to interpret the Plan and decide finally and conclusively any questions that may arise in connection with it. The Hourly Plan also provides that in the event a determination made by the Committee comes under judicial review, it is intended that the court give deference to that determination to the maximum extent permitted by law (citations omitted).

Presently before the court are the parties' cross motions for summary judgment, in which each side argues that it is entitled to judgment as a matter of law. The court now turns to the motions.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) empowers the court to render summary judgment "forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if , show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See F.D.I.C. v. Alexander, 78 F.3d 1106 (6th Cir. 1996). The Supreme Court has affirmed the court's use of summary judgment as an integral part of the fair and efficient administration of justice. The procedure is not a disfavored procedural shortcut. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); see also Kutrom Corp. v. City of Center Line, 979 F.2d 1171, 1174

(6th Cir. 1992).

The standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Winningham v. North Am. Resources Corp., 42 F.3d 981, 984 (6th Cir. 1994) (citing Booker v Brown & Williamson Tobacco Co., 879 F.2d 1304, 1310 (6th Cir. 1989)). The evidence and all inferences therefrom must be construed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Enertech Elec., Inc. v. Mahoning County Comm'r, 85 F.3d 257, 259 (6th Cir. 1996); Wilson v. Stroh Co., Inc., 952 F.2d 942, 945 (6th Cir. 1992). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); see also Hartleip v. McNeilab, Inc., 83 F.3d 767, 774 (6th Cir. 1996).

If the movant establishes by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the opposing party must come forward with "specific facts showing that there is no genuine issue for trial." First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 270 (1968); see also Adams v. Philip Morris, Inc., 67 F.3d 580, 583 (6th Cir.

1995). Mere allegations or denials in the non-movant's pleadings will not meet this burden. Anderson, 477 U.S. at 248. Further, the non-moving party cannot rest on its pleadings to avoid summary judgment. It must support its claim with some probative evidence. Kraft v. United States, 991 F.2d 292, 296 (6th Cir.), cert. denied 510 U.S. 976 (1993).

III. DISCUSSION

A. ERISA Preemption

Plaintiff first argues that he entered into an express or implied contract with the Company guaranteeing him dual pension benefits, that the Company breached that contract, and that it should be estopped from denying plaintiff dual benefits. Plaintiff bases his claims on the statements and writing made by James Valrance prior to plaintiff transferring from an hourly to salaried position. However, defendants assert that plaintiff's breach of contract and estoppel claims are preempted by ERISA.

ERISA preempts state law and state law claims that "relate to any employee benefit plan." 29 U.S.C. § 1144(a); see also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47-48 (1987). "[T]he express pre-emption provisions of ERISA are deliberately expansive." Pilot Life, 481 U.S. at 45-46. A stae law claim relates to an employee benefit plan "if it has a connection with or reference to such a plan." Shaw v. Delta

Air Lines, Inc., 463 U.S. 85, 97 (1983). However, even if a cause of action refers to a plan, that action will not "relate to" the plan for preemption purposes if it only peripherally affects the plan. See Thiokol Corp., Morton Int'l, Inc. v. Roberts, 76 F.3d 751, 754 (6th Cir. 1996), cert. denied, 117 S. Ct. 2448 (1997).

Plaintiff maintains that the court does not have to interpret the terms of the Salaried or Hourly Plans to address his state law claims. However, the Plans govern plaintiff's eligibility for pension benefits, the manner in which those benefits are calculated based on his years of service with the Company and his transfer from an hourly to salaried position, and the timing and resolution of any claim for benefits. Furthermore, the remedy that plaintiff seeks would effectively modify the terms of the Plans so as to pay plaintiff a monthly Salaried Plan benefit based on his entire years of service at the Company plus a monthly Hourly Plan benefit based on his years of service as an hourly employee. Thus, plaintiff's state law claims are preempted by ERISA because the remedy sought–the payment of enhanced pension benefits under the Plans– depends on the interpretations and application of ERISA-regulated plans.

This case is unlike that of Perry v. P*I*E Nationwide Inc., 872 F.2d 157 (6th Cir. 1989), cert. denied, 493 U.S. 1093 (1990), which plaintiff cites in support of his nonpreemption argument. The employees in Perry claimed that their company wrongfully induced them to participate in

an employee stock investment plan which was expressly subject to ERISA. They sued for rescission and restitution of the wage reduction implemented by the plan. The Sixth Circuit rejected the company's argument that the plaintiffs' claims were preempted by ERISA, stating that "preemption should apply to a state law claim only if Congress has provided a remedy for the wrong or wrongs asserted." Id. at 162 (citing Dependahl v. Falstaff Brewing Corp., 653 F. 2d 1208 (8th Cir.), cert. denied, 454 U.S. 968 (1981)). Because Congress did not provide for the rescissionary or restitutive remedies sought by the plaintiffs, the Perry court held that there was no ERISA preemption for their state claims of fraud, misrepresentation, and promissory estoppel.

The unique remedies sought in Perry are not sought here. Unlike the Perry plaintiffs, in this case, plaintiff seeks to recover ERISA plan benefits. Accordingly, ERISA preempts plaintiff's state law claims.

B. Equitable Estoppel Under ERISA

Next, plaintiff contends that even if his state law claims are preempted by ERISA, defendants should still be estopped from denying him dual pension benefits pursuant to a theory of equitable estoppel under ERISA. Specifically, plaintiff argues that because Valrance promised him dual pension benefits, the Company is now bound by his promise. The Sixth Circuit has held that equitable estoppel may be a viable theory in ERISA cases concerning welfare plans.

Armistead v. Vernitron Corp., 944 F.2d 1287, 1299-1300 (6th Cir. 1991). However, the ERISA plans at issue in the case at bar are pension plans. See id. at 1300 (ERISA precludes application of the equitable estoppel doctrine to disputes over pension plans). In addition, the Sixth Circuit recently held that "[p]rinciples of estoppel ... cannot be applied to vary the terms of unambiguous plan documents; estoppel can only be invoked in the context of ambiguous plan provisions." Sprague v. General Motors Corp., Nos. 94-1896, 94-1897, 94-1898, 94-1937, 1998 WL 3382, at *14 (6th Cir. Jan. 7, 1998). Here, the Salaried and Hourly Plans unambiguously fail to provide dual or extra pension benefits to those hourly employees who move into a management position. Plaintiff's position "contravenes a basic principle of ERISA that terms of a plan may not be modified or superseded by oral statements or other extrinsic evidence." Gordon v. Barnes Pumps, Inc., 999 F.2d 133, 137 (6th Cir. 1993) (citing Musto v. American Gen. Corp., 861 F.2d 897, 907 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989)).

Moreover, even if equitable estoppel was cognizable in this case, plaintiff has failed to show that he can satisfy his burden of supporting such a claim. The elements of an equitable estoppel claim are: (1) conduct or language amounting to a representation of material fact; (2) the party to be estopped must be aware of the true facts; (3) the party to be estopped must intend that the representation be acted on, or the party asserting the estoppel must reasonably believe that

the party to be estopped so intends; (4) the party asserting the estoppel must be unaware of the true facts; and , (5) the party asserting the estoppel must reasonably or justifiably rely on the representation to his detriment. Sprague, 1998 WL 3382, at *14; Tregoning v. American Community Mut. Ins. Co., 12 F.3d 79, 83 (6th Cir. 1993), cert. denied, 511 U.S. 1082 (1994); Armistead, 944 F.2d at 1298.

Assuming that plaintiff could meet his burden as to the elements one, three and four, he has not demonstrated that he can prove elements two and five. First, Plaintiff has produced no evidence suggesting that Valrance knew the statements he was making to plaintiff about the proposed Salaried Plan were not true but nonetheless made with the intent to induce plaintiff to take a salaried position. In fact, Valrance testified that he did not intend his statements to be contractual in nature, but was merely providing plaintiff with an example of what his pension benefits might be once the Salaried Plan was in place. Nor has plaintiff proffered any support for the proposition that he suffered a detriment in taking the salaried position considering that the Salaried Plan pays more in monthly benefits for the same amount of credited service as the Hourly Plan pays, and that the Retirement Committee calculated plaintiff's total monthly benefit under the Salaried Plan based on his total years of service. In other words, the amount of plaintiff's total pension benefit award is greater than what he would have received had he remained an hourly employee such that

plaintiff took no detrimental action in reliance on Valrance's misrepresentations. For all of these reasons, plaintiff's equitable estoppel claim must be dismissed.

C. Review of the Retirement Committee's Decision

For the reasons stated above, plaintiff's claims arise exclusively under ERISA, and both the Salaried and Hourly Plans are undisputedly employee pension benefit plans governed by ERISA. Under ERISA, a denial of benefits by a plan administrator is reviewed under a de novo standard unless the plan grants the administrator discretionary authority "to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 (1989). In such a case, a court must review the administrator's benefits determination under an arbitrary and capricious standard. Id.; Yeager v. Reliance Standard Life Ins. Co., 88 F.3d 376, 381 (6th Cir. 1996); Miller v. Metropolitan Life Ins. Co., 925 F.2d 979, 983 (6th Cir. 1991). The Sixth Circuit has held that an administrator's eligibility determination is not arbitrary and capricious if it is "rational in light of the plan's provisions." Daniel v. Eaton Corp., 839 F.2d 263, 267 (6th Cir.), cert. denied, 488 U.S. 826 (1988). In other words, under this highly deferential standard of review, the plan administrator's determination will be upheld if "it is possible to offer a reasoned explanation, based on the evidence, for [that] particular outcome." Davis v. Kentucky Fin. Cos. Retirement Plan, 887 F.2d 689, 693 (6th Cir. 1989),

cert. denied, 495 U.S. 905 (1990); see also Miller, 925 F.2d at 984. In this case, the court must review the Retirement Committee's decision under an arbitrary and capricious standard because both Plans give the Retirement Committee broad discretion to determine claims.

After careful examination of the record, the court finds that the Retirement Committee's decision to deny plaintiff's request for dual pension benefits was reasonable in light of the Hourly and Salaried Plans' provisions. Actually, plaintiff inaccurately characterizes the Committee's determination as a denial of benefits. To the contrary, the Committee awarded plaintiff a generous pension under both Plans with an overall benefit at a higher level than he would have normally received under a strict reading of the Plans. Furthermore, nothing in either Plan supports plaintiff's argument that he is entitled to "dual" benefits. The Retirement Committee's award was well within the discretion granted to it by both Plans to interpret and apply the Plans' terms and to issue a final and conclusive determination on any question that might arise, including plaintiff's claim for dual benefits. Accordingly, the Committee's determination was neither arbitrary nor capricious and must thus be affirmed.

D. Plaintiff's Claim for Lifetime Medical Benefits

Plaintiff also argues that he is entitled to receive medical benefits under the terms of the Hourly Plan which he states is "specifically incorporated into the Collective

Bargaining Agreement between Shopman's Local Union 508 of the International Association of Bridge, Structural and Ornamental Iron Workers (AFL-CIO) and Defendants." Apparently, plaintiff believes that because he was awarded a disability pension in 1997 pursuant to the Hourly Plan, he is also entitled to the medical benefits provided for hourly employees through the 1995 labor agreement between the Company and its hourly production and maintenance employees. However, plaintiff left the hourly ranks of the Company on May 5, 1981, to take a salaried position and was undisputedly a salaried employee when his employment officially ended in 1992. Both the provisions of the labor contract in effect at the time of plaintiff's transfer to a salaried position in 1981, and the 1995 labor contract are applicable only to production and maintenance employees represented by Local Union 508.

Furthermore, it is immaterial that the Retirement Committee awarded plaintiff a disability pension benefit under the terms of the Hourly Plan because the Hourly Plan, like the Salaried Plan, does not provide for medical coverage for persons who qualify for a disability retirement pension. The fact that plaintiff was awarded a vested pension benefit under the Hourly Plan does not mean that he is automatically covered by the labor agreement in effect at the time of the award because the Hourly Plan is not integrated with the labor contract. The Hourly Plan expressly governs the pension rights of vested hourly employees, like plaintiff, who

terminate service before becoming eligible for pension benefits. Hourly employees may vest pension benefits under the terms of the Hourly Plan, and a vested employee retains the ability to later obtain a pension benefit even in the event the employee leaves the bargaining unit or the Company before otherwise qualifying for such benefit. In contrast, the labor contract applies to those employees who are part of the bargaining unit at the time the contract is in effect or who have retired from employment as a represented member. Therefore, plaintiff's claim for lifetime medical benefits must be dismissed.

E. Plaintiff's Request for Imposition of Statutory Penalties

Lastly, plaintiff argues that he is entitled to a $100 per day statutory penalty for defendants' plan administrator's failure to timely provide certain requested ERISA plan documents. A plan administrator is obligated under ERISA to provide specified information about employee benefit plans to participants upon written request. 29 U.S.C. § 1024(b)(4).[8] In this case, on October 12, 1994, plaintiff sent defendants a

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[8]29 U.S.C. § 1024(b)(4) states in relevant part:

The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

letter requesting, inter alia, copies of the Salaried Plan and Salaried Plan documents "including IRS Forms 5500,[9] filed within the last four (4) years." Jonathan Lucas, defendants' plan administrator, did not send plaintiff a copy of the Salaried Plan description until January 20, 1995. In addition, Lucas forwarded plaintiff a copy of the Hourly Plan on November 11, 1996, in response to a discovery request. However, the parties later learned that Lucas had provided plaintiff with the wrong version of the Plans, and Lucas gave plaintiff a correct version of the Plans on July 3, 1997. Furthermore, on August 22, 1997, Lucas provided plaintiff with the Form 5500's for the years 1989-1992, but has never given plaintiff the Form 5500 for 1993, as requested.

ERISA provides that any plan administrator

> who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or

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[9]The Forms constitute the Plan's tax return and include actuarial information, Plan liability and funding figures, a summary plan description, and other information relative to the Plan.

> beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1)(B). Accordingly, plaintiff seeks the imposition of the statutory penalty for: (1) the period between November 13, 1994 (30 days after the request for the Salaried Plan), and July 3, 1997, the date plaintiff received the correct version of the Salaried Plan; and, (2) the period between November 13, 1994 (30 days after the request for the Form 5500's) and the date of judgment because plaintiff still has not received the Form 5500 for 1993.

On the other hand, defendants urge the court to deny plaintiff's request for statutory penalties, arguing that plaintiff was not prejudiced by any failure on Lucas's part to provide him with the Form 5500's or to earlier provide him with a copy of the applicable Plans. "Two factors generally guide a district court's discretion: prejudice to the plaintiff and the nature of the administrator's conduct in responding to the participant's request for plan documents. Although prejudice is a pertinent factor for the district court to consider, it is not a prerequisite to imposing a penalty." Davis v. Featherstone, 97 F.3d 734, 738 (4th Cir. 1996).

After careful consideration, the court declines to impose penalties against defendants because plaintiff has not

shown that his rights were harmed or otherwise prejudiced by the delay in his receipt of the requested information, nor has he demonstrated bad faith or intentional delay on Lucas's part. Although a correct version of the Plans was important and should have been provided at the outset, nothing suggests that Lucas intentionally provided plaintiff with the wrong Plans or that the original Plans sent differed materially from the applicable Plans. Rather, a review of the disability retirement provisions in both versions shows that they are essentially the same. In addition, plaintiff's claim that the Form 5500's were important to allow him to determine his level of benefits is improbable considering the exceeding difficulty one would face in attempting to calculate their personal benefit level from the data contained in the Forms. Moreover, in December of 1994, Lucas, the plan administrator for both the Hourly and Salaried Plans, sent plaintiff a personal statement of benefits showing him that his exact vested pension benefit was $981.97 per month and the manner in which it was calculated. Thus, plaintiff received a full statement of his benefit level within two months of his initial inquiry about benefits, and he has failed to prove that defendants' conduct prejudiced his application for pension benefits. Accordingly, no award of statutory penalties is warranted.

IV. CONCLUSION

For the aforementioned reasons, plaintiff's motion for summary judgment hereby is DENIED, and defendants' motion for summary judgment is hereby GRANTED.

SO ORDERED.

BARBARA K. HACKETT
United States District Judge

Dated: March 4, 1998.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOE KNICKERBOCKER,

Plaintiff,

Case No. 95-CV-60335-AA

vs.

HON. BARBARA K. HACKETT

OVAKO-AJAX, INC., AJAX ASSOCIATED COMPANIES, INC., RETIREMENT INCOME PLAN FOR NON-UNION EMPLOYEES, and JONATHAN LUCAS,

Eastern Dist. of Michigan
Filed 3/4/98

Defendants.
_____/

JUDGMENT

The above-captioned matter has come before the court on cross-motions for summary judgment, and in accordance with the court's order denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment entered on March 4, 1998,

IT IS ORDERED AND ADJUDGED that judgment

hereby is GRANTED in favor of defendants.

Dated at Ann Arbor, Michigan this 4 day of March, 1998.

JOHN P. MAYER
CLERK OF THE COURT

By:_____
Deputy Clerk

Approved:

_____
Barbara K. Hackett
United States District Judge

No. 98-1319

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOE KNICKERBOCKER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
OVAKO-AJAX, INC., ET AL	)	
	)	
Defendants-Appellees.	)	

6th Circuit Court of Appeals
Filed 9/7/99
Leonard Green, Clerk

BEFORE: WELLFORD, SUHRHEINRICH, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

99-1147

No. ____

Supreme Court, U.S.
FILED
JAN 3 2000
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH KNICKERBOCKER,
Petitioner,

v.

OVAKO-AJAX, INC., AJAX ASSOCIATED COMPANIES, INC., RETIREMENT INCOME PLAN FOR NON-UNION EMPLOYEES, AND JONATHAN LUCAS, PLAN ADMINISTRATOR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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15 pp

CORPORATE DISCLOSURE STATEMENT OF OVAKO-AJAX, INC.

Respondent Ovako-Ajax, Inc. is a corporation wholly owned by SKF ab. SKF ab is a corporation incorporated under the laws of the country of Sweden.

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Sixth Circuit properly interpreted § 502(c)(1)(B) of ERISA by concluding that a district court may consider prejudice to a plan participant as a factor in exercising its discretion to impose a statutory penalty?

II. Whether in deciding this matter the United States Court of Appeals for the Sixth Circuit and the district court required that a plan participant has the burden of showing prejudice as a prerequisite to being awarded a statutory penalty under § 502(c)(1)(B) of ERISA?

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§ 502(c)(1)(B) . . . . . *passim*

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Rules of the Supreme Court of the United States
Rule 10 1

JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for certiorari only for compelling reasons. Pursuant to Rule 10, compelling reasons may be found, among other things, if the decision leading to the petition: contributes to a conflict of authority between the circuit courts of appeal and/or state courts of last resort; reflects a departure from the usual course of judicial proceedings; or presents an important question of federal law that has not been but should be settled by this Court.

Petitioner has not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. There is no split of authority among the circuit courts of appeal on the issues presented. Moreover, Petitioner entirely misreads and misapplies the decision of the U.S. Court of Appeals for the Sixth Circuit in this matter. For the reasons explained fully below, there were no errors in the lower courts, and the Petition should be denied.

STATEMENT OF THE CASE

The Petitioner's statement of the case overlooks several facts pertinent to this matter and which are contained in the district court's opinion. Appendix to Petition pp. 23a-28a. Petitioner is a former employee of Respondent Ovako-Ajax, Inc. who started his employment as an hourly employee and later was promoted into salaried management. His employment ceased in 1991.

On October 12, 1994 Petitioner sent a letter to Respondent Jonathan Lucas, the plan administrator and Chairman of the Retirement Committee for the Ovako-Ajax, Inc. salaried employee pension plan, requesting a copy of the salaried plan and an estimate of any retirement benefits that he might be entitled to if he were awarded a disability retirement pension. Petitioner also asked for the salaried plan's Form 5500s filed with the Internal Revenue Service from 1989 to 1993. The Form 5500 constitutes the plan's tax return and includes actuarial information, plan liability and funding figures, a summary plan description, and other information relative to the plan.

By letter dated December 21, 1994, Petitioner was advised that he was not at that time eligible for a disability retirement under the terms of the salaried employee plan. In addition, Petitioner was provided a benefit statement showing his exact accrued retirement benefit under the salaried plan and his accrued retirement benefit under the pension plan applicable to hourly employees and how those figures were calculated. On January 9, 1995 Petitioner's attorney sent a letter stating that he represented the Petitioner and asking for a copy of the salaried plan. Thereafter, on March 20, 1995 Petitioner's attorney sent a letter seeking immediate payment of disability retirement pension benefits for Petitioner under

the salaried plan. After that request for disability benefits was denied, Petitioner's attorney filed an appeal with the plan's Retirement Committee seeking review of the denial. Within three months of his inquiry into the amount of his accrued monthly benefits, therefore, Petitioner was represented by counsel in a request for pension benefits.

On December 20, 1995, Petitioner filed a Complaint in the United States District Court for the Eastern District of Michigan alleging several state law claims, a claim for pension benefits under the Employee Retirement Income Security Act, and a claim that the court should impose a $100 per day penalty under § 502(c)(1)(B) of ERISA for Respondents' failure to provide him with copies of the Form 5500s for the salaried plan. On March 13, 1997, the Retirement Committee awarded Petitioner a disability retirement pension under both the salaried plan and hourly plan. Petitioner was provided with Form 5500s in July 1997. On March 4, 1998, the district court granted Respondents' Motion for Summary Judgment in its entirety. Appendix to Petition pp. 20a-48a.

The district court declined to impose a statutory penalty against Respondent Jonathan Lucas regarding the Form 5500s for several reasons: (1) the Petitioner had not shown that his rights were harmed or otherwise prejudiced by the delay in his receipt of the requested information; (2) he had not demonstrated bad faith or intentional delay on the Retirement Committee's part; and (3) within two months of Petitioner's initial inquiry about his benefits, the Retirement Committee sent Petitioner a personal benefits statement identifying the exact amount of benefits he was eventually awarded by the Retirement Committee and the manner in which his benefits were calculated. Appendix to Petition pp. 44a-45a.

After oral argument, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court on July 20, 1999.

ARGUMENT

I. The U.S. Court Of Appeals For The Sixth Circuit Did Not Require A Showing Of Prejudice Before The District Court May Consider Imposing A Statutory Penalty Under § 502(c)(1)(B) Of ERISA

At the bottom of page 5, Petitioner asserts that in its unpublished opinion the U.S. Court of Appeals for the Sixth Circuit "held that many courts, in their discretion, have not imposed any penalty under § 1132(c)(1)(B) [of ERISA] in the absence of prejudice." Petitioner then asserts that the Sixth Circuit found that "absent prejudice the penalty cannot be awarded." Petitioner entirely misstates the Sixth Circuit's opinion.

Section 502(c)(1)(B) of ERISA states that:

> Any administrator .... who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up

> to $100.00 a day from the date of such failure or refusal, and the Court may in its discretion order such other relief as it deems proper.
>
> 29 U. S. C. § 1132(c)(1)(B) (emphasis added)

In its opinion, the U.S. Court of Appeals for the Sixth Circuit expressly recognized that while § 502(c)(1)(B) of ERISA authorizes penalties, it does not require them. Appendix to Petition p. 10a It further recognized that the statute expressly commits the decision to impose penalties to the district court's discretion. *Id.* p. 11a Therefore, the Sixth Circuit reviewed the district court's decision whether to impose penalties for an abuse of discretion. *See also Bartling v Fruehauf Corp.*, 29 F3rd 1062, 1068 (6th Cir. 1994). An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made. *Id.*

The Sixth Circuit then recognized that "although § 1132(c)(1)(B) does not require prejudice to impose penalties, a district court *may consider* prejudice in exercising its discretion." Appendix to Petition p. 11a (emphasis added). It went on to state "We note that many courts, in their discretion, have not imposed any penalty under § 1132(c)(1)(B) in the absence of prejudice." *Id.* Consequently, the Sixth Circuit ruled that the district court did not abuse its discretion by considering the issue of prejudice in deciding whether to impose penalties. *Id.* at pp. 11a-12a.

Petitioner's statement at page 5 is therefore incorrect. Nowhere in its opinion did the Sixth Circuit suggest that a showing of prejudice was required before the district court could impose a statutory penalty.

Moreover, nowhere in *Bartling* did the Sixth Circuit state that penalties cannot be imposed unless there is a showing of prejudice. Indeed, in affirming the district court's decision to award a penalty in *Bartling*, the Sixth Circuit stated only that: "Many courts have refused to impose a penalty under § 502(c)(1)(B) in the absence of a showing of prejudice or bad faith." 29 F. 3d at 1068.

Likewise, Petitioner is incorrect in asserting that the Sixth Circuit is in conflict with other circuit courts of appeal which have addressed this issue. Petition at p. 5. Each circuit court has, like the Sixth Circuit, expressly recognized that a district court may consider prejudice as a factor in deciding whether to award statutory penalties. *Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F. 2d 580, 588 (1st Cir. 1993)("Although prejudice and bad faith are not prerequisites for imposition of penalties, these are factors which the district court properly considered in exercising its discretion not to impose penalties."); *Davis v. Featherstone*, 97 F. 2d 734, 738 (4th Cir. 1996)(holding that district courts should assess two factors in deciding whether to impose a penalty: prejudice to plaintiff and nature of administrator's conduct); *Godwin v. Sun Life Assur. Co. of Canada*, 980 F. 2d 323, 327 (5th Cir. 1992)("Although section 1132 does not require the claimant to show he was prejudiced to be entitled to penalties, we suggested in *Paris* that prejudice is one factor a district court may consider in exercising its discretion."); *Bartling*, *supra*, 29 F. 3d at 1068; *Harsch v. Eisenberg*, 956 F. 2d 651, 662 (7th Cir. 1992)("the statute commits the size of a penalty to the district court's discretion; the judge may, but need not, consider the provable injury when exercising that discretion"); *Moothart v. Bell*, 21 F. 3d 1499, 1506 (10th Cir. 1994)(finding that while neither prejudice nor injury are a prerequisite to awarding penalties, "these are factors the district court may consider in deciding whether to exercise its

discretion"); *Curry v. Contract Fab. Inc. Profit Sharing Plan*, 891 F. 2d 842, 847 (11th Cir. 1990)("In exercising its discretion . . . the trial court may undoubtedly consider whether a denial of information prejudiced a plaintiff, but prejudice is not a prerequisite to an award of civil penalties.").[1]

None of these circuit courts of appeal, including the Sixth Circuit, has held, or even suggested, that prejudice is a prerequisite to imposing a penalty under § 502(c)(1)(B). Rather, each court has found that a district court is free to consider prejudice as a factor in deciding whether to assess a penalty. Upon a true reading of these opinions, it is therefore evident that Petitioner misstates the Sixth Circuit's decision in this matter, as well as the decisions of the First and Fifth Circuits in *Rodriguez-Abreu, supra* and *Godwin, supra*. See Petition at p. 7.

Moreover, as the Sixth Circuit properly ruled, the district court did not abuse its discretion in declining to impose a penalty. The district court declined to impose a penalty because it found that there was no harm or prejudice to Petitioner; there was no bad faith or intentional misbehavior on the part of Respondent; and that Respondent timely transmitted a personal benefit statement showing Petitioner the exact amount of his vested pension benefit.

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[1] Petitioner's cite of *Daughtry v. Honeywell, Inc.*, 3 F. 3d 1488 (11th Cir. 1993) is unavailing inasmuch as the U.S. Court of Appeals for the Eleventh Circuit held only that the district court erred by basing its decision to deny penalties *solely* on the plaintiff's failure to show prejudice. In *Daughtry*, the defendant did not provide the plaintiff with a benefits statement until one year after the plaintiff asked for it. In contrast, in this case the Respondents provided Petitioner with a complete benefits statement two months after his written request for one.

Appendix to Petition pp. 44a-45a. The Sixth Circuit affirmed that the district court acted within its discretion. *Id.* pp. 11a-12a. This Court should therefore deny the petition for a writ of certiorari.

II. The U.S. Court Of Appeals For The Sixth Circuit Did Not Rule That Petitioner Has The Burden Of Showing Prejudice As A Prerequisite To Being Awarded A Statutory Penalty

Petitioner again incorrectly states that in its opinion the Sixth Circuit implied that a plan participant has the burden of persuasion as to whether or not prejudice is a requisite to the district court's award of a statutory penalty. Petition at 11. The Sixth Circuit expressly stated that it was not opining on the unbriefed issue of whether the plan participant or the plan administrator had the burden of persuasion on the claim for penalties. Appendix to Petition pp. 11a. Indeed, nowhere in its opinion does the Sixth Circuit find, expressly or by implication, that the plan participant has the burden of showing prejudice, or other compelling reasons, before penalties may be imposed. Nor did the district court make such a finding. *Id.* pp. 42a-45a.

Petitioner fails to engage in a true reading of the Sixth Circuit's opinion. The Sixth Circuit found only that the district court's conclusion that Petitioner was not prejudiced was not an abuse of discretion and that it was not improper for the district court to rely on this factor in declining to impose a penalty. *Id.* pp. 11a-12a.

There is no demonstration of error on the part of the U.S. Court of Appeals for the Sixth Circuit nor on the district

court in declining to impose statutory penalties. This Court should therefore deny the petition for writ of certiorari.

CONCLUSION

In presenting his arguments in favor of a writ of certiorari, Petitioner misstates the decision of the U.S. Court of Appeals for the Sixth Circuit in this matter. The Sixth Circuit did not decide that a plan participant must demonstrate prejudice before being entitled to statutory penalties under ERISA. There is no conflict in the circuit courts of appeal on this issue in that all recognize that prejudice is but one factor that a district court may review in exercising its discretion to impose penalties. Nor did the Sixth Circuit decide that a plan participant has the burden of persuasion on the issue of prejudice. Finally, the district court's opinion shows that it considered several factors in addition to prejudice in declining to impose a penalty. Therefore, it is unnecessary for this Court to assert its discretionary jurisdiction in this matter, and this Court should deny the petition for a writ of certiorari.

/s/_____
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Dated: December 30, 1999